IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Kent Gruber,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 6553
	)	
Speedway, LLC, a Delaware company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A possessor of land may be liable for falls resulting from slips on foreign substances if the proprietor or its employees had actual or constructive notice of the condition. The circumstantial evidence available in this case permits the inference that the defendant may have had actual or constructive notice of a condition that caused the plaintiff to slip, fall, and injure himself. For that reason, the defendant's summary judgment motion must be denied.

Facts

On December 28, 2018, Kent Gruber stopped at a Speedway store located at 21 West 400 North Avenue in Lombard. The store was owned and operated by Speedway, LLC ("Speedway"). Gruber purchased coffee and a doughnut and then slipped on a yellow, greasy, custard-like substance near the door. Gruber fell and broke his leg.

On June 13, 2019, Gruber filed a two-count complaint against Speedway. Count one is a cause of action for premises liability while count two is a cause of action for negligence. In each count, Gruber alleges that Speedway, through its employees, had actual or constructive notice of the yellow substance and its dangerous condition. Gruber claims Speedway breached its duty of care to maintain the premises in a reasonably safe condition by, among other things, failing

to inspect and maintain the premises, warn Gruber of the substance, and remove it. On July 25, 2019, Speedway answered the complaint. Speedway also filed an affirmative defense alleging that Gruber breached the duty for his own safety by negligently failing to keep a proper lookout, avoid a known danger, and avoid an open and obvious condition.

The case proceeded to written and oral discovery. The parties acknowledge that the store was busy on the morning of December 28, 2018. Other than that, the parties draw very different conclusions from the factual record. Both parties rely on low-quality surveillance video showing the general area before and during Gruber's fall. From 8:30 to 9:05 a.m., the video does not show anyone, including Gruber, dropping anything on the floor. Additional key evidence is contained in the witness statement recorded by Speedway employee and cashier Subhash Bangia, who was working at the time of Gruber's fall, and his subsequent deposition. In his written statement, Bangia wrote that Gruber was holding a coffee cup in his right hand and was eating a doughnut as he walked toward the cash register. After viewing the video at his deposition, Bangia admitted that Gruber was holding the coffee cup in his left hand and was not eating a doughnut. Bangia further admits that at around 9:05:43, the video appears to show another customer who fits the description contained in Bangia's written statement. Additionally, the video shows another customer waiting in line with two hot dogs or sausages less than two minutes before Gruber fell. Bangia testified that no other customers reported a slippery substance on the floor and no other customers slipped or fell that day.

In his deposition, Gruber testified that he did not see any substance on the floor generally or in the area where he fell despite standing only a foot or two away in the minutes leading up to his fall. Gruber admitted that, based on his recollection and video, he could not say without speculating how long the yellow, custard-like substance had been on the floor before he slipped and fell. He agreed the low quality of the video makes it impossible to see the substance on the floor or determine whether and when someone dropped the substance. Gruber confirmed the presence of another customer standing in line, holding food in his left hand, but could not say whether that person dropped

custard from his food onto the floor. Gruber also agreed that he did not notice whether that customer held anything that would have had yellow custard on or in it. Gruber stated that the custard-like substance blended in with the beige floor tiles. Finally, Gruber stated that he did not take any photographs of the substance on the floor after he fell.

On April 5, 2021, Speedway filed its motion for summary judgment. The parties subsequently filed their respective response and reply briefs.

Analysis

Summary judgment is appropriate if the record reveals there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c). In determining whether a genuine issue of material fact exists, a court must "construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). "Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22 (quoting *Espinoza v. Elgin, Joliet & E. Ry.*, 165 Ill. 2d 107, 114 (1995)). Summary judgment is a drastic means of disposing of litigation and "should only be allowed when the right of the moving party is clear and free from doubt." *Id.* (quoting *Adams*, 211 Ill. 2d at 43).

A defendant may move for summary judgment by pointing out the absence of evidence supporting the plaintiff's position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368-69 (1st Dist. 2006). If the defendant carries its initial burden of production on a *Celotex* motion, the burden shifts to the plaintiff to show a factual basis to support the elements of their claim. *Willett*, 366 Ill. App. 3d at 369. "While parties opposing a summary judgment motion are not required to prove their case, they are under a duty to present a factual basis which would arguably entitle them to judgment in their favor, based on the applicable law." *Id.*

Under such circumstances, speculation, conjecture, or guess are each insufficient to withstand summary judgment. *McGath v. Price*, 342 Ill. App. 3d 19, 27 (1st Dist. 2003). At the summary judgment stage, a court does not choose between competing inferences or weigh evidence to decide which of the parties' interpretations of the facts is more likely. *Bank Computer Network Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 110 Ill. App. 3d 492, 497 (1st Dist. 1982). Further, "a court cannot make credibility determinations or weigh evidence in deciding a summary-judgment motion." *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (4th Dist. 2008).

To recover on a slip-and-fall incident, a plaintiff must establish the existence of a duty owed by the defendant, a breach of that duty, and an injury proximately resulting from that breach. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 225 (2010). Whether a duty exists is a question of law for the court to decide. *Id.* at 226. Questions regarding the elements of breach and proximate cause are reserved for the trier of fact. *Id.*

A defendant owes a business invitee a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of N.Y., Inc.*, 2011 IL App (1st) 092860, ¶ 16. A possessor of land may be liable for falls resulting from slips on foreign substances if: (1) the proprietor negligently placed the substance on the floor or ground; (2) the proprietor or its employees knew the substance was there; or (3) the substance was there for a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered. *Heider v. DJG Pizza, Inc.*, 2019 IL App (1st) 181173, ¶ 30. Speedway and Gruber do not dispute that Speedway owed Gruber a duty of care. Rather, the focus of the summary judgment motion is whether Speedway, through its employees, had actual or constructive notice that the custard-like substance was on the floor.

As to actual notice, Gruber argues that Bangia's inconsistent testimony shows that he intended to cover up Speedway's liability to avoid blame for having seen the custard before Gruber fell. Although Gruber's argument is exaggerated and has no basis in fact, the

inconsistency in Bangia's written statement and deposition testimony raises the issue of his credibility. It is plain that credibility is always an issue for a jury to decide. *Hulman v. Evanston Hosp. Corp.*, 259 Ill. App. 3d 133, 149-50 (1st Dist. 1994) (jury to decide how to weigh inconsistent testimony); *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 498-99 (1974) (credibility of witness who presents contradictory testimony is for jury to decide). Given the existing evidence, it is certainly possible that Bangia's written statement merely reflects his mistaken identity of Gruber and another customer. In other words, there is an alternative, plausible explanation for Bangia's conflicting statements given the proximity in space and time between Gruber and the other customer. And even if the mistaken customer did not spill the substance on the floor, the video shows another customer waiting in line with two hot dogs or sausages less than two minutes before Gruber fell.

Even if Bangia's written statement is an inadvertent mistake, the video raises other questions of fact that cannot be decided at this point. First, several Speedway employees previously walked on or near the area where Gruber later fell. Second, two Speedway cashiers had a direct line of sight to the area where Gruber fell. Third, a Speedway employee stood approximately 10 feet from where Gruber fell. While it is possible these employees did not see any substance on the floor because there was none, it is also possible the substance was there, but the employees failed to do anything to clean it up. In short, there is a question of material fact as to actual notice.

As to constructive notice, Gruber relies on *Heider*. 2019 IL App (1st) 181173. In that case, Heider presented circumstantial evidence that he slipped and fell on water on the defendant's property that had existed for an hour and 40 minutes prior to his fall. *Id.* ¶ 10. The court found a question of fact existed as to whether the pizza parlor had constructive notice because: (1) no evidence contradicted Heider's claim that no one spilled anything; (2) no employee mopped the floor; and (3) there was no other plausible explanation for what could have caused the water to be on the entryway floor. *Id.* at ¶¶ 37-38. In other words, circumstantial evidence was sufficient to create a question of material fact, particularly when there are gaps in the existing evidence. *Id.*

In this case, the same circumstantial evidence that creates questions of material fact as to actual notice also creates questions of material fact as to constructive notice. As in *Heider*, there is no evidence contradicting Gruber's claim that no one spilled anything, no employee mopped the floor, and there was no other plausible explanation for what could have caused the substance to be on the floor. In short, if the custard-like substance had been on the floor for at least 35 minutes prior to Gruber's fall, a jury must resolve whether that amount of time constituted constructive notice imputed to Speedway and its employees.

Conclusion

For the reasons presented above, it is ordered that:

Speedway's motion for summary judgment is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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